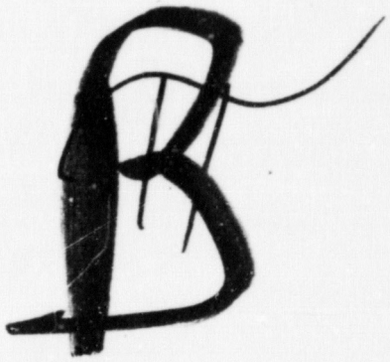
United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1113

To be argued by
LOUIS A. TIRELLI



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

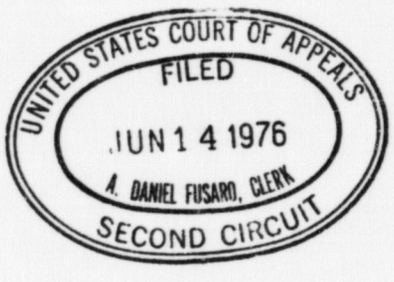
JORGE GONZALEZ,

Appellant.

----------x

On Appeal from a Judgment of Conviction
of the United States District Court for
the Southern District of New York

BRIEF FOR APPELLANT



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PRELIMINARY STATEMENT

The appellant, JORGE GONZALEZ, appeals from a judgment of conviction rendered in the United States District Court for the Southern District of New York (Cannella, J.) on the 4th day of March 1976, which adjudged him guilty under Count One of Indictment S 75 Cr. 429 and sentenced him to a prison term of seven years.

Count One of the indictment charged that appellant and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841 (a) (b), 841 (b) (1), 952 (a), 955, 959, 960 (a) and 960 (b) (2) of Title 21, United States Code.

There is an issue common to all appellants: that issue being the oft raised one of allowing the trial of multiple conspiracies under the guise of a single conspiracy.

In accord with the admonition of the Federal Rules of Appellate Procedure, to treat common issues jointly and to avoid duplication, this issue is being treated separately in th is brief only. However, counsel for all appellants participated in the analysis of the law and assisted in the preparation of the fact patterns hereinafter set forth. It is anticipated that they may address separate remarks in their briefs as this issue may apply to any particular appellant.

Appellant JORGE GONZALEZ has the issue of a speedy trial in common with RUBEN DARIO ROLDAN. Therefore on the speedy trial issue appellant JORGE GONZALEZ joins in accordance with the admonition of the Federal Rules of Appellate Procedure,[1] to treat common issues jointly and to avoid duplication.[2] Accordingly although this speedy trial issue is being treated in the brief of RUBEN DARIO ROLDAN, since both appellants JORGE GONZALEZ and RUBEN DARIO ROLDAN filed simil .r motions and petitioned the Court sometimes in the same oral hearing, your appellant will only lay the fact pattern herein for JORGE GONZALEZ. However, counsel for appellants RUBEN DARIO ROLDAN and JORGE GONZALEZ both participated in the analysis of the law and assisted in the preparation of the fact patterns set forth in both briefs.

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1. Hereinafter referred to as FRAP

2. Rule 28(i) FRAP

ISSUES PRESENTED FOR REVIEW

1. Did the government's failure to afford appellant a trial within the six-month period provided by the rules governing prompt disposition of criminal cases require the dismissal of the indictment?
2. Did the failure of the trial court to hold a hearing and make findings of fact on the reasons for the government's delay in bringing this indictment to trial require a remand for further proceedings?
3. Did the government fail to establish that appellant was a member of the conspiracy?
4. Do the points raised by other appellants, in which appellant joins, require reversal of the judgment of conviction herein?

CONCISE STATEMENT OF THE CASE

The Pretrial Motions for a Speedy Trial

Appellant, JORGE GONZALEZ, was arrested on September 17, 1974 by New York State authorities for violation of the state

narcotics laws. The investigation which led to this arrest was a joint effort by state and federal law enforcement agents. At the time of appellant's arrest by state authorities, a detainer warrant was lodged with the state by federal authorities (h 8-9)* Both the state and federal charges involved the same alleged narcotics violations. On October 4, 1974 a federal Grand Jury in the Southern District of New York returned an indictment 74 Cr. 939, against appellant and others, charging them with violations of the federal narcotics laws and other related crimes.

On October 31, 1974 appellant was arrested by federal authorities and lodged in the Federal House of Detention after being unable to post a bail of $150,000.

On January 2, 1975, appellant, through his attorney, submitted an application for dismissal of the indictment, or alternatively to be released in his own recognizance, pursuant to Rule 3 of the Second Circuit Court of Appeals governing prompt disposition of criminal cases. This was some 105 days subsequent to appellant's arrest.

At a hearing pursuant to this application before the Honorable HAROLD R. TYLER, JR., on January 20, 1970, the government asked for a continuance, pleading "exceptional circumstances" within the control of the prosecutor's office, as permitted under Rule 5 (c) (2) (H 9-10). The basis for the exceptional circumstances was the Assistant United States Attorney's claim of unfamiliarity

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*Numbers in parenthesis preceded by H refer to minutes of hearing of January 20, 1975 before the Honorable HAROLD R. TYLER, JR., District Court Judge; numbers preceded by T refer to minutes of trial.

with the case because of its recent assignment to him (H 10).

According to the government's calculations, appellant was the only defendant who at that point has been incarcerated in excess of ninety days, and on that basis as well as on the exceptional circumstances existing in the prosecutor's office asked for a continuance not to exceed one month (H 12).

The court, pursuant to Rule 5 (c)(2), found exceptional circumstances sufficient to support the government's application for a continuance, and gave the government until February 18, 1975 to file its notice of readiness (H 17).

A request was then made for the setting of a trial date shortly after February 18, 1976, and although the court agreed that that was a good idea, it was unable to do so at that time (H 20-21).

On February 18, 1975, the government filed a notice of readiness.

On April 30, 1975, a superseding indictment, S 75 Cr. 429, was handed down by the Grand Jury, incorporating and expanding the charges contained in the original indictment 74 Cr. 939.

It is to be noted that JUDGE TYLER resigned from the bench and the case was assigned to JUDGE POLLACK. JUDGE TYLER had directed that tape transcripts and wire tap logs be furnished to appellant or his attorney. This was not accomplished until May of 1975, some five months subsequent to JUDGE TYLER'S order. Your appellant's attorney in fact appeared before JUDGE TYLER on the last few days before his resignation became effective

and stringently requested that the government do as it was directed by him. This was all to no avail.

On May 30, 1975, appellant--who at that point had been in custody on the federal charges in excess of eight months--moved pursuant to Rules 3 and 4 of the Local Rules of the Southern District for Prompt Disposition of Criminal Cases for an order striking the government's notice of readiness. Appellant contended that the notice of readiness was a sham in that the government knew that it was not ready for trial. Alternatively, appellant asked for an order dismissing the indictment for failure to bring appellant to trial within the six-month period prescribed by the rules in question.

In addition, appellant contended in said motion that the government's failure to bring him to trial within the six-month period resulted in the loss of two witnesses--the co-defendants ARTURO GONZALEZ and RAMIRO SANCOCHO--who would have given exonorating testimony in appellant's behalf at trial. This loss of witnesses prejudiced the trial of appellant and further mention will be made of this later in this brief.

On June 2, 1975, appellant submitted a further motion to strike the government's notice of readiness for trial on the ground that such notice was a sham, or alternatively for dismissal of the indictment for failure to bring appellant to trial within

six months. It was appellant's contention that the government had filed its notice of readiness in bad faith, knowing that the government had not been ready for trial and, in fact, had not yet furnished appellant with items of discovery and other relevant materials as previously stipulated to by all parties. Further relief in the form of an evidentiary hearing to determine whether the government's notice of readiness had been filed in bad faith and why the trial had not been commenced within six months was also requested.

A further motion for dismissal of the indictment pursuant to Rule 48 (b) of the Federal Rules of Criminal Procedure was submitted on August 13, 1975. In that motion it was contended by appellant that at all times he had been ready, willing and able to stand trial.

With the exception of the hearing before JUDGE TYLER on January 20, 1975, no additional hearings were held on any of the three subsequent motions to dismiss the indictment for failure to prosecute, nor were any findings made or orders entered as to why appellant had not been brought to trial within six months.

The trial of this indictment commenced on October 1975--some fourteen months after appellant had become an accused in this case--and it was not until January 16, 1976, after the trial had already been in progress for three months and all sides

had rested, that the court ruled on the motions for a speedy trial. In so ruling, the court stated:

> "My law clerks brings* to mind that it may be possible that the record does not disclose that I have moved on the speedy trial. I think sub silentio I have done that, otherwise I would not have continued a 13 week trial. Therefore, I deny the motion for a speedy trial, with an exception to each defendant that made it (T 7772)." *(sic.)

The Trial

The major proof against appellant at the trial consisted of a number of intercepted telephone conversations between appellant and other co-defendants and co-conspirators, which purported to show, according to the government, the utilization of code words to aid and carry out the criminal transactions which formed the basis for the indictment.

Appellant, through counsel, rested his defense on the ground that all words used by him in these intercepted telephone conversations were uttered within the framework of their normal meanings, and that the government's otherwise contentions--at least as to appellant--were pure speculation.

Additionally, appellant contended that the telephone conversations in which his voice appeared were recorded from the telephone at the home of appellant's brother, ARTURO GONZALEZ--also a co-defendant in this case and one of the two

who was tried in absentia--and that appellant merely had answered the telephone whenever his brother was not present, often speaking to parties whom he did not know and of matters which were equally unknown to him, as the recorded conversations themselves often established.

It was appellant's position at trial that even if there had been a conspiracy along the lines set forth in the indictment, he had been unaware of it and had not been a party thereto.

Appellant was convicted as charged and was sentenced on March 4, 1976 to a prison term of seven years.

ARGUMENT

POINT ONE

THE GOVERNMENT'S FAILURE TO AFFORD APPELLANT A TRIAL WITHIN THE SIX-MONTH PERIOD PROVIDED BY THE RULES GOVERNING PROMPT DISPOSITION OF CRIMINAL CASES REQUIRED THE DISMISSAL OF THE INDICTMENT.

On January 20, 1975--some four months after appellant had become an accused in this case--a hearing was held before the Honorable HAROLD R. TYLER, District Court Judge, on appellant's application for dismissal of the indictment or alternatively for his release on his own recognizance pursuant to the appropriate rules governing prompt disposition of criminal cases. Upon representations of the government, the court found exceptional circumstances to justify a continuance and gave the government until February 18, 1975 to file a notice of readiness.

After the government's notice of readiness was filed on February 18, 1975, appellant, over the next eight months, moved on formal papers on three separate occasions for a prompt disposition of the indictment pursuant to the appropriate rules, and further moved orally for such relief on various court appearances had during this period of time. Despite these numerous requests for prompt dispostion of the indictment and despite the filing of the government's notice of readiness, appellant was not

brought to trial until October 20, 1975, some fourteen months after he had become an accused in this case.

It is plain that once the government filed its notice of readiness, the government could no longer rely on any of the exceptions of the rules governing prompt disposition of criminal cases which would relieve the government of its burden of going to trial within six months.

Once the issue of "exceptional circumstances" to justify delay has been removed from the case, as here, the court is bound by the mandatory language of the rules governing prompt disposition of cases. For example, Rule 4 provides that the "charge shall be dismissed" whenever the government is not ready for trial within six months following arrest. "The use of the imperatives'must' and 'shall' and of the word 'charge' manifest an intent * * * that the dismissal be mandatory." Hilbert v. Dooling, 476 F.2d 363, 366 (2nd Cir. 1973).

The government, of course, cannot avoid its obligation to be ready for trial within the prescribed six-month period simply by filing a notice of readiness that it knows to be meaningless. United States v. Pollak, 474 F.2d 828, 830 (2nd Cir. 1973). This is especially true when, as here, the government, at the time of such filing, has not yet complied with its pretrial discovery obligations. (See appellant's Memorandum of April 7, 1975, wherein it is stated that the government had not yet furnished the defense with the transcripts of the intercepted telephone conversations and other pertinent materials.)

To permit the government to avoid its obligations under the prompt dispositionrules merely by filing a meaningless notice of readiness would do violence to these rules and subvert the very reasons upon which the rules are based. The rules are designed to alleviate the problems of delay in criminal cases by setting standards stricter than the minimum period prescribed by the applicable statute of limitations or required by the Sixth Amendment, and "the government is put on notice that if it does not comply with the Rules, which provide ample leeway for the legitimate needs of preparing a prosecution, it will be foreclosed from proceeding with the prosecution." Hilbert v. Dooling, supra, 476 F.2d 365. This is true "whether a defendant has been prejudiced in a given case or his constitutional rights have been infringed." Id. at 365.

If the rules governing prompt disposition of criminal cases are to have any continuing validity, appellant's conviction must be reversed and the indictment dismissed.

POINT TWO

THE FAILURE OF THE TRIAL COURT TO HOLD A HEARING AND MAKE FINDINGS OF FACT ON THE REASONS FOR THE GOVERNMENT'S DELAY IN BRINGING THIS INDICTMENT TO TRIAL, REQUIRES A REMAND FOR FURTHER PROCEEDINGS.

The trial of this case did not commence until nine months after the government had filed its notice of readiness. This period of delay clearly constituted an abridgment of the rules governing prompt disposition of cases, and unless the government is able to establish "exceptional circumstanes" to justify the delay, the indictment should be dismissed.

Although the court had held a hearing prior to the filing of the government's notice of readiness and had found such "exceptional circumstances", no such hearing or findings had been made during the nine-month period following the filing of the government's notice of readiness, despite the fact that appellant had continually asserted his right to a speedy disposition of the indictment under the appropriate rules.

Once the government filed its notice of readiness, the "exceptional circumstances" found by the court to justify the prior delay no longer existed and the case should have been brought to trial promptly. If, however, the government had not been ready for trial--as was clearly the case--a hearing was required, at a minimum, to determine if new "exceptional

circumstances" existed to justify the delay. Absent such a hearing and findings of fact, "it is impossible for [this Court] to review the propriety of the [trial court's] denial of the defense motion." United States v. Scafo, 470 F.2d 748, 750-51 (2nd Cir. 1972). And when, as here, the government has filed a notice of readiness but has not complied with discovery arrangements, the trial court must determine if such notice was meaningless. United States v. Pollak, supra, 474 F.2d at 830.

In the instant case, the court not only failed to hold a hearing on appellant's various motions on this matter, but delayed rendering a decision on those motions until all sides had rested at the trial proper, at which time the court, without making any findings, summarily denied the motions for a speedy disposition. Clearly, such a belated and summary rejection does not comport in any fashion whatsoever with the mandates of the prompt disposition rules.

Even though the defendant is not required to demonstrate prejudice when there has been an abridgement of his rights under the prompt disposition of cases rules, appellant alleged, without opportunity to prove, that the delay in bringing this case to trial resulted in the loss of two witnesses--the co-defendants ARTURO GONZALEZ and RAMIRO SANCOCHO--who would have testified favorably in his behalf had the trial been commenced within its required time. Defendant is entitled to a hearing on his claim that he had been deprived of favorable testimony

because of the government's procrastination in bringing this indictment to trial. See United States v. Blaustine, 325 F. Supp. 233 (E.D.N.Y. 1970).

Accordingly, this Court should "vacate the judgment of the district court and remand the case for further hearing on the motion to dismiss for failure to comply with the Rules Regarding Prompt Disposition of Criminal Cases." United States v. Scafo, supra, 470 F.2d at 751.

POINT THREE

THE GOVERNMENT'S FAILURE TO AFFORD APPELLANT AN IMMEDIATE TRIAL IMPAIRED THE ABILITY OF APPELLANT TO DEFEND HIMSELF.

Appellant was arrested on September 17, 1974 and did not go to trial until October 20, 1975, a period of over thirteen months for a three month trial that was unduly drawn out by the prosecution. From the time of appellant's arrest until the time when he could finally place his witnesses on the stand was a period of about sixteen months.

During this extraordinarily long period of incarceration, appellant was continually requesting the court to proceed to trial so that he could defend his innocence. However, because of the prosecution's delay in bringing the case to trial, appellant had lost his major witnesses - ARTURO GONZALES, the man for whom JORGE GONZALEZ worked and in whose apartment all taped phone conversations were received while appellant was there working, separating precious stones for ARTURO GONZALES; and RAMIRO SANCOCHO who would have testified favorably on behalf of appellant had the trial been commenced at an early date. Indeed due to the government's long delay, your appellant was left with character witnesses.

As stated in other parts of this brief appellant continually requested a speedy trial through written motions orally argued before the respective assigned District Judge. These motions were made

at the end of the period of three months, four months and six months incarceration of appellant. Indeed there were letters written to the Court requesting the prosecution to put in answering affidavits such as appellant's attorney's letter of August 6, 1975 sent to the HONORABLE JOHN M. CANNELLA (L1) wherein it was stated:

> "..you (JUDGE CANNELLA) had give MR. CAREY (the prosecutor) until August 1, 1975 to submit his papers into Court or you would act only on the motions of defendants."

Nevertheless, the government was permitted to submit its answering papers beyond the August 6th date and appellant's motions were denied.

This occurred also in my letter of May 5th, 1975 to the HONORABLE JOHN M. CANNELLA with copies to the HONORABLE MILTON POLLACK and MICHAEL Q. CAREY (L2). Because of the change of District Judges assigned to the case your appellant's motions were put aside for months including motions on the electronics surveillance of telephone conversations wherein your appellant requested copies of translations of same and requested a hearing on the legality of said tapes. Again the government delayed unduly.

Indeed the HONORABLE JUDGE HAROLD R. TYLER, JR. had granted the prosecution additional time to put in its response on the January 2, 1975 motion of your appellant for a speedy trial.

Barker v. Wingo, (1972) 407 U.S. 514 states that:

> "Delay is not an uncommon defense tactic. As the time between the commission of the crime and the trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. Then it is the prosecution which carries the burden of proof." (underlining added by your appellant)

Barker v. Wingo then continues:

> "...Furthermore, a finding of violation of the right is not to be lightly taken, because 'the only possible remedy' is the dismissal of the indictment."

Further the Court in Barker v. Wingo (supra) gave a fourfold balancing test, requiring the cases to be approached on an ad hoc basis. This fourfold test which should be used by the courts to assess the determination whether a particular defendant has been deprived of his right is as follows:

A. Length of Delay

Your appellant suffered a delay of more than 13 months through the beginning of the trial from his period of initial incarceration and almost 16 months to the period when he was first able to place a defense witness on the stand.

B. The Reason for the Delay

i. Although the government made numerous assertions that the breadth of the case was so great that it was unable to quickly prepare its case. The following factors should also be taken into consideration. The government's

continual delay in even answering motions submitted by your appellant.

ii. The use by the government of only one Spanish to English interpreter in spite of the onerous task faced by that interpreter of the numerous telephone conversation tapes to be translated. This was readily admitted before JUDGE TYLER when your appellant's motion at the end of the period of three months had been orally argued in Court.

iii. The prosecution communicating its readiness to the Court within six months while in effect it had not even translated the tapes it was to use against your appellant at that period.

C. The Defendant's Assertion of his Right

As noted above your appellant continually requested that the government go to trial on its case against your appellant. This request was made at the end of three months of incarceration, at the end of four months of incarceration, at the end of six months of incarceration and at the end of eight months of incarceration your appellant wrote letters to the Court requesting that they answer the earlier motions. Accordingly your appellant continually requested a trial and was denied this right either by outright denials of

motions by the Court or merely by the prosecution and government ignoring said motions.

D. Prejudice to the Defendant

There is no question but that defendant lost his only witnesses ARTURO GONZALES and RAMIRO SANCOCHO both of whom would have testified favorably on behalf of appellant and it would have appeared that appellant would have been found not guilty with their testimony.

Clearly from the above your appellant has been prejudiced causing an abridgement of his rights and the loss of an opportunity to prove his innocence in this matter. Accordingly since your appellant has been deprived of the right to trial by jury which unlike other constitutional rights works to the disadvantage of the accused, this Court should thus vacate the judgment of the District Court and remand the case for further hearing on the motion to dismiss for failure to grant your appellant a speedy trial.

POINT FOUR

THE GOVERNMENT FAILED TO ESTABLISH THAT APPELLANT WAS A MEMBER OF THE CONSPIRACY.

Appellant's conviction rests, for the most part, on the intercepted telephone converstaions between appellant and other co-defendants or co-conspirators. There is no independant proof that appellant was a member of any narcotics conspiracy or in fact that appellant even knew that such a conspiracy existed.

An examination of the various telephone conversations introduced against appellant by the government at the trial (T) fails to establish appellant's connection with or participation in any conspiracy. The topics of these various intercepted telephone conversations consisted of small talk, everyday events and legitimate business transactions. The government, however, theorized at the trial that certain words were used as code words to camouflage the illegal activities of the narcotics conspiracy.

It is appellant's contention on this appeal that the government's theory, absent other proof, "was insufficient to prove that he was a member of the conspiracy." United States v. Fantuzzi, 463 F.2d 683 (2nd Cir. 1972). To allow a conviction to stand solely on the government's theory that ordinary words really had meanings of a nefarious nature, would permit the

government to concoct plausible charges against any person capable of speech. Such power in the hands of any government goes far toward creating the Big Brother State found in George Orwell's famous novel "Eighteen .inety-Four".

Assuming that the government had in fact established the guilt of other co-defendants in this case, "the Government has proved little more than association between [appellant] and the conspirators." United States v. Fantuzzi, supra, 463 F.2d at 691.

Clearly, "an association with an alleged conspirator, without more, is insufficient to establish the necessary foundation for the admissibility of the [alleged] incriminating statements, United States v. Ragland, 375 F.2d 471, 477 (2nd Cir. 1967). And although this quotation was made in a somewhate different legal context, its applicability here is appropriate. Whether the incriminating admissions were of a hearsay nature--as was the case in Ragland--or out of the mouth of appellant, there should be other evidence connecting appellant with the conspiracy, unless, of course, the incriminating admissions were such as to leave no room for ambiguity as to their meaning. That is not the case here. As was stated in United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938), the accused must "in some sort associate himself with the venture, * * * participate in it as in something that he wishes to bring about * * * [or] seek by his action to make it succeed." None of this did

the government prove in this case.

And, of course, absent such additional proof, any hearsay admissions made by other conspirators concerning appellant may not form the basis for appellant's conviction. United States v. Gearney, 417 F.2d 1116, 1120 (2nd Cir. 1969), cert. denied, sub nom. Lynch v. United States, 397 U.S. 1028 90 S. Ct. 1276, 25 L.Ed.2d 539 (1970); United States v. Fantuzzi, supra.

POINT FIVE

APPELLANT JOINS IN ALL OF THE POINTS RAISED BY OTHER APPELLANTS WHICH ARE NOT INCONSISTENT WITH THE POINTS RAISED IN THIS BRIEF

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR A NEW TRIAL ORDERED, OR ALTERNATIVELY THE JUDMENT BELOW SHOULD BE REVERSED AND THE CASE REMANDED FOR A HEARING CONSISTENT WITH THE CLAIMS RAISED IN THIS BRIEF

Respectfully submitted,

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